

The Emergence of Mediation as a Tool in Cross-Border Cases

R3-Insol Europe Joint Conference 2017
London May 19, 2017



Mediation & Insolvency – a Natural Match

- Heavily utilized in US insolvency matters
 - Resolution of discrete disputes, such as actions to recover wrongful transfers
 - Resolution of multi-party disputes, including development of consensual plans of reorganization
- Used in UK as well
 - Primarily for resolution of discrete litigation matters
- EU encourages use of mediation
 - But acceptance has been slow
 - Especially slow adoption in insolvency cases

Mediation in Cross Border Matters

- ◆ Cross-Border Disputes Often Raise Jurisdiction, Choice of Law, and Forum Challenges
 - ◆ A given dispute may not clearly fall within the jurisdiction of any one court – or there may not be jurisdiction over one or more parties
 - ◆ Choice of law and forum may not be certain
 - ◆ Uncertainty increases litigation and outcome risk
 - ◆ Risks also introduce delay (imposing additional cost and uncertainties)

Mediation in Cross Border Matters (cont'd)

- ◆ Mediation can offer a cost-effective mechanism for reducing uncertainty and resolving disputes
 - ◆ Accelerates the process of moving from problem to solution
 - ◆ Provides a buffer against counterproductive posturing
 - ◆ Aids the parties in honestly evaluating their positions
 - ◆ Enables productive conflict resolution
 - ◆ Affords flexibility to design a solution based on economics
 - ◆ Assures confidentiality
 - ◆ Brings principals together

Mediation in Cross Border Matters (cont'd)

- ◆ Mediation can also afford a path that saves parties money and uncertainty
 - ◆ Eliminates or minimizes discovery, briefing and witness preparation
 - ◆ Affords an alternative mechanism to overcome difficult unresolved legal issues
 - ◆ In cross border cases, especially useful for overcoming jurisdictional and conflict of law hurdles

Mediation in Cross Border Matters (cont'd)

- ◆ Cross border matters do present specific challenges, but none are insurmountable
 - ◆ Language? Most commercial disputes are easily resolved in English, but translators can also be utilized (and have been)
 - ◆ Enforceability? A mediated settlement is best memorialized by court approval, but need not be, so long as the enforcement mechanisms are incorporated in the mediated settlement
 - ◆ Location? Cross border disputes always involve distance and travel; mediators are transportable
 - ◆ Differences in legal regimes? Some mediators have expertise in cross-border insolvency, as well as in local legal regimes
 - ◆ Differences in culture and cultural expectations? Again, some mediators have greater familiarity with a wide variety of legal and social cultures

Mediation in Cross Border Matters (cont'd)

- ◆ New technologies make cross-border mediation easier
 - ◆ Electronic real time document sharing
 - ◆ Real time modeling of alternatives
 - ◆ Live-stream participation
- ◆ Alternative ADR solutions available as backstop
 - ◆ Follow-on arbitration
 - ◆ Mediator settlement proposals

What Happened in Nortel?

Nortel Networks commenced insolvency proceedings in Canada, the US, the UK, and France, along with secondary proceedings in other countries. A successful sale of IP assets resulted in a fund of over \$8 billion for distribution.

Multiple efforts to resolve how to distribute the proceeds via mediation failed.

Why?

Nortel Sale of Assets

- ◆ Sale orders authorizing sales were entered by US, Canadian and French courts, with approval of UK Administrator
- ◆ Sale orders did not make findings regarding which estate owned which assets
- ◆ No pre-sale agreement was reached regarding allocation of expected sale proceeds
- ◆ Proceeds were deposited in a US banking institution, pending resolution of allocation dispute
- ◆ Parties could not agree on how to allocate the sale proceeds

Nortel Players

- ◆ The bondholders
 - ◆ Canadian issues, with US guaranties
 - ◆ Trading at par plus
- ◆ Unsecured creditors
 - ◆ Committees in US and in Canada
 - ◆ Dwarfed by bondholder claims
- ◆ Pension Benefit Guaranty Corp.
 - ◆ Massive claims against US estate
 - ◆ Joint and several control group claims
- ◆ The UK Pension Fund
 - ◆ Acting on behalf of UK pension holders with claims against UK estate
 - ◆ Asserted guaranty claims against Canada and FSD claims against all estates
- ◆ The Canadian former employees and pensioners
 - ◆ Direct claims as unsecured creditors of Canadian estate
 - ◆ Indirect claims against US estate

Nortel Courts

◆ Canada

- ◆ Mr Justice Morawetz the assigned judge
 - ◆ Experienced insolvency practitioner
 - ◆ Advocate of cross border cooperation
- ◆ Mr Justice Newbould
 - ◆ Experienced trial lawyer
 - ◆ Strong personality

◆ United States

- ◆ Honorable Kevin Gross
 - ◆ Experienced insolvency practitioner
 - ◆ Respected jurist of the Delaware bankruptcy bench
 - ◆ Supporter of cross border cooperation
 - ◆ Familiar with large stakes bankruptcy practitioners

Nortel Mediation Process

- ◆ Respected American mediator, multiple mediation rounds between October 2010 and April 2011 were not successful
- ◆ Respected Canadian jurist selected as mediator; multiple rounds of mediation between June 2011 and January 2013 failed

Nortel Mediation Process (cont'd)

- ◆ US and Canadian courts, over objections, granted motions to take jurisdiction over allocation dispute
- ◆ Litigation ensued – at great cost
- ◆ Rulings by Canadian and US courts
- ◆ Mediation renewed in October 2015; successful resolution among most parties in June 2016

Why did mediation fail, then succeed?

- The role of the mediator
- The influence of the courts
- The posture of the case
- The economics of the case
- The cross border influences

Closing Thoughts